Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [02/28/89]

CASE NBR: [88105890] EOH STATUS: [ ]
SHORT TITLE: [McDonald, In Re Jessie]
VERSUS [ ] DATE DOCKETED: [091988]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Sep 19 1988		Petition for writ of habeas corpus and motion for leave to proceed in forma pauperis filed.
Sep 19 1988		Motion of petitioner for leave to proceed in forma pauperis filed.
Dec 1 1988		DISTRIBUTED. January 6, 1989
Jan 9 1989		REDISTRIBUTED. January 13, 1989
Jan 13 1989		REDISTRIBUTED. January 19, 1989
Feb 6 1989		REDISTRIBUTED. February 17, 1989
Feb 21 1989		Motion of petitioner for leave to proceed in forma pauperis DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall, Justice Blackmun and Justice Stevens join. (Detached opinion.)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

88 - 5890

OCTOBER TERM, 1988

ORIGINAL

In re, JESSIE D. MCDONALD,

PETITIONER.

RECEIVED
OCT 3 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Criminal Court No. B-317

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the Petitioner, Jessie D. McDonald, pro se and moves this Court, pursuant to Rules 43, and 46 of the Rules of the Supreme Court of the United States, for leave to file the attached Petition for Writ of Habeas Corpus, in forma pauperis, on grounds, owing to my poverty, I am unable to pay the necessary fee's and costs for filing and for other reasons as set out in the accompanying affidavit.

This being the 12th., day of September, 1988.

Respectfully submitted,

Jessie D. McDonald

JESSIE D. MCDONALD, Pro se
P.O. Box 5724
2134-14th. Ave. No.
Nashville, Tenn. 37208
(615) 256-3434

RECEIVED
SEP 19 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JESSIE D. MCDONALD

Petitioner

v.

THE STATE OF TENNESSEE

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, JESSIE D. MCDONALD being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes X No ____

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   Approx. $300.00 - Self Employed

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

   N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes ____ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   N/A

3. Do you own any cash or checking or savings account? Yes X No ____

   a. If the answer is yes, state the total value of the items owned. Less than $25.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No X

   a. If the answer is yes, describe the property and state its approximate value.

   N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Myself

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Jessie D. McDonald

Subscribed and sworn to before me this 12th. day of September, 1988

Susie P. Bartell
Notary

My commission expires May 8th., 1991

DOCKET NO.____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In re, JESSIE D. MCDONALD,

Petitioner.

Criminal Court No. B-317

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner, Jessie D. McDonald, pro se, petitions this Court to issue a writ of habeas corpus; directed to the State of Tennessee, and shows as follows:

1. JURISDICTION

Jurisdiction to grant the writ of habeas corpus sought by petitioner herein, is conferred on this Court by the provisions of Section 2241(a), Title 28, United States Codes, and Rule 27.3(a),(b) of the Rules of this Court.

2. QUESTIONS PRESENTED FOR REVIEW

1. Whether an adequate remedy is available to petitioner in a lower federal court, since the petitioner exhausted his state remedies by a direct appeal, and the sentence has long since expired ?

2. Whether the petitioner is required to pursue the state's habeas corpus procedure, since the lower state court's do not have jurisdiction to reverse a judgment from the Tennessee Supreme Court ?

3. Whether this Court should exercise its discretion to grant the writ, where the petitioner has no other remedy available to him ?

QUESTIONS PRESENTED Continue

4. Whether grounds exist for concluding that the petitioner is unlawfully restrained of his liberties, when the proof at the trial showed that there had never been a criminal violation of the statute used to prosecute the petitioner ?

5. Whether the conviction on the petitioner's record should be expunged, since there has not been a criminal offense committed, within the meaning of the statute used for prosecution, and he was convicted of a crime, not charged in the indictment ?

3. CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution:

> " No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury;... nor be deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment to the United States Constitution:

> " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. STATEMENT OF THE CASE

1. This petition is filed pursuant to the authority to issue a writ of habeas corpus vested in this Court by the provisions of Section 2241(a), Title 28, United States Codes, and Rule 27.3(a),(b) of the Rules of this Court, to obtain an order to set aside the conviction, to restore his lawful liberties.

2. Petitioner was ordered committed to the warden of the Tennessee State Penitentiary, at Nashville, by the Honorable, Allen R. Cornelius, Jr., State judge for Division III, Criminal Court for Davidson County, at Nashville, Tennessee, by order dated, near May 6th., 1976, in Case No. B-317, after the case was remanded to the trial court, by order of

the Tennessee Supreme Court. A copy of the trial court's order is not available to be attached to the petition.

3. Petitioner states that he was deprived of his constitutional rights in the course of the trial resulting in his conviction aforesaid, in that he was convicted of a crime, not charged in the indictment, after being brought to trial, under an indictment that failed to allege a criminal violation, where there was no property brought before the trial court, valued at a sum over $100.00, as required by Section 39-1901, T.C.A., which the prosecution was based on.

4. The petitioner has made several applications to the district court, in the course of thirteen (13) years, which were denied and affirmed by the Sixth Circuit, while he was in custody serving the sentence. However in the instant case, the petitioner has not applied to the district court, because he is no longer confined and the sentence has long since expired.

5. The petitioner has exhausted his state remedies, by direct appeal, to the Tennessee Court of Criminal Appeals, where the conviction was reversed, but reinstated by the Tennessee Supreme Court, and the lower courts lack jurisdiction to reverse the judgment of the Tennessee Supreme Court.

6. Copies of the Opinion from the Court of Criminal Appeals and the printed judgment from the Tennessee Supreme Court, are attached hereto, to give the Court an understanding of the instant petition.

7. The proof at the trial showed that, the "title", that was alleged in the indictment, had no monetary value whatsoever, unless the automobile and title was obtained at the same time, and possession of both, resulted from the false pretense, supported by the testimony of Mr. Butler, a representative of the Tennessee Department of Revenue, who stated that it was his department that was responsible for issuing the titles. The proof at the trial further showed that the petitioner obtained possession of the 1972 Ford,LTD automobile at issue, under a valid contractual agreement, nearly six months prior to the date that was alleged in the indictment. The petitioner was never charged with providing false information, to obtain the credit to purchase the automobile at issue.

5. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The petitioner's constitutional right to due process of law, under the Fifth Amendment to the United States Constitution had been violated, in the trial proceedings, where the jury based its verdict on the property being the "1972 Ford, LTD, automobile", when the indictment alleged the property to be a "title", to the 1972 Ford, LTD, automobile, which was the reasons why the Tennessee Court of Criminal Appeals reversed the conviction and set aside the three year sentence.

However, when the Tennessee Supreme Court granted certiorari, to render a judicial interpretation on Section 39-1901, T.C.A., when there was no cross-petition filed with the clerk, the judgment of the state supreme court, deprived the petitioner of the opportunity to prevail on the constitutional violations, where he was convicted of a crime, not charged in the indictment.

In the instant case, the petitioner was anticipating further proceedings being conducted in the trial court, in compliance with the opinion entered by the Court of Criminal Appeals, on May 13th., 1975, BUT , the final judgment of the state supreme court prevented further proceedings in the trial court, and the outcome of the matter was final, and the lower courts are without powers to change or otherwise alter, and therefore, denied the right to prevail on his constitutional violations. Under such circumstances, this Court has granted habeas corpus relief. Cox Broadcasting Corp. v. Cohn, Ga., 1975, 95 S.Ct. 1029, 420 U.S. 469, 43 L.Ed. 2d 328, on remand, 214 S.E. 2d 530, 234 Ga. 67. It is clear that the State of Tennessee has waived the right to retry the petitioner, by the fact, the sentence has long since expired, and a period of thirteen years has lapsed. An application for writ of habeas corpus, if presented after exhaustion of state remedies, should be made directly to U.S. Supreme Court. In re, Miller, C.C.A., 1942, 126 F.2d 826, Cert Denied 62 S.Ct. 1107, 316 U.S. 677, 86 L.Ed. 1751, Reh. den. 62 S.Ct. 1307, 316 U.S. 713, 86 L.Ed.1778; Kramer v. State of Nevada, C.C.A., Nev.,1941, 122 F.2d 417.

Further, it is clear that the Tennessee Court of Criminal Appeals put the State of Tennessee on Notice, to proceed further in a manner not inconsistent with its opinion, as stated in the May 13th.,1975 judgment, which clearly stated that there had been a violation of Fifth Amendment to the United States Constitution, by the fact, the petitioner's conviction was based on a charge and property that was not specified and stated in the indictment. A time period of over thirteen years has since lapsed, and there has been no further proceedings to indict the petitioner on the charge convicted of, nor a trial held on the indictment that was rendered by the grand jury. Under such circumstances, it has been held by the United States Court of Appeals for the Sixth Circuit that, a conditional grant of a writ of habeas corpus required the petitioner's release from custody if new proceedings were not commenced by the state within the prescribed time period. Fisher v. Rose, 757 F.2d 789 (6th. Cir.,1985).

REASONS FOR NOT MAKING APPLICATION TO DISTRICT COURT

The petitioner states that, the trial court lacked subject matter jurisdiction, as well as jurisdiction over the persons of the petitioner since there has not been a criminal offense committed, within the meaning of the state statute, Section 39-1901,T.C.A., which was the basis for the prosecution, to justify the district court having the powers to entertain a petition for writ of habeas corpus.

The petitioner has never been indicted, as required by the Fifth Amendment to the United States Constitution, on the charged which the jury based its conviction. Further, the indictment that was used to initiate the trial..,do not allege a criminal offense, within the meaning of Section 39-1901,T.C.A., which alleges a 'title', to an automobile to be the property, when the proof at the trial, showed that the title had no monetary value whatsoever.

Therefore, under such circumstances, there is the presence of exceptional circumstances, warranting the exercise of the Court's discretionary powers and adequate relief cannot be had in any other form or from any other court.

6. CONCLUSION

WHEREFORE, the petitioner pray this Court to correct the judgment of the Tennessee Supreme Court, by including that of the Court of Criminal Appeals and set aside the conviction and three years sentence; direct the State of Tennessee to expunge the said conviction, from all public records; and all other and further relief the court deems proper.

Respectfully submitted,

Jessie D. McDonald

JESSIE D. MCDONALD, Pro se
P.O. Box 5724
2134-14th. Ave. No.
Nashville, Tenn. 37208
(615) 256-3434

VERIFICATION

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, Jessie D. McDonald, being first duly sworn , depose and says that, I am the petitioner; and that the information contained in the above petition is true and correct, to the best of my knowledge and belief.

Jessie D. McDonald
JESSIE D. MCDONALD

Subscribed and sworn to before me on this 29th., day of September, 1988.

Jessie P. Barbee
Notary Public

My Commission Expires: 5/8/91

IN THE COURT OF CRIMINAL APPEALS, NASHVILLE

JESSIE D. McDONALD,
Plaintiff in Error

vs.

STATE OF TENNESSEE,
Defendant in Error

Davidson County
No. B-317 Below

Offense:
Obtaining Property by False Pretenses.

Reversed and Remanded.

J U D G M E N T

Came the plaintiff in error, Jessie D. McDonald, representing himself, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and upon consideration thereof, this Court is of opinion that there is reversible error on the record in that the plaintiff in error was convicted of a crime not charged in the indictment.

It is, therefore, ordered and adjudged by this Court that the judgment of the Court below is reversed, the verdict of the jury set aside, and the cause remanded to the Criminal Court of Davidson County for further proceedings not inconsistent with the Court's opinion, a certified copy of which will accompany the procedendo on the remand, and for the collection of the costs of the Court below; for all of which, let procedendo issue.

Plaintiff in error is allowed to remain on original bond.

(1)

The State of Tennessee will pay the costs of the appeal, which will be certified to the proper officer of the State for payment in the manner provided by law.

The Clerk of this Court will furnish duly certified copies of this judgment to the Sheriff of Davidson County and to the Warden of the State Penitentiary. 5/13/75 .

(O'Brien, J., Dissenting)

Office of CLERK OF THE COURT OF CRIMINAL APPEALS
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, erfect, and complete copy of the JUDGMENT *f said Court, pronounced at its February term, 19*75*, in case of* JESSIE D. McDONALD *against* STATE OF TENNESSEE *s appears of record now on file in my office.*

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 13th *day of* May, *19*75

Ramsey Leathers, *Clerk*

By Margaret M. Tinsley, *Deputy Clerk*

Procedendo
c: Sheriff
Warden
Cost Bill
Mr. McDonald

(2)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

NASHVILLE, SEPTEMBER 1974 TERM

FILED
MAY 13 1975
RAMSEY LEATHERS
CLERK
COURT OF CRIMINAL APPEALS

JESSIE D. McDONALD Plaintiff in Error v. STATE OF TENNESSEE Defendant in Error	No. B-317 Davidson County Honorable Allen R. Cornelius, Jr. Judge (Obtaining Property by False Pretenses)

For Plaintiff in Error:

Jessie D. McDonald, Pro Se
Nashville, Tennessee

For Defendant in Error:

Milton P. Rice
Attorney General
of Tennessee

William C. Koch, Jr.
Assistant Attorney General
Nashville, Tennessee

Robert H. Schwartz
Assistant District
Attorney General
Nashville, Tennessee

OPINION FILED: MAY 13 1975

REVERSED AND REMANDED

W. Wayne Oliver
Judge

(3)

O P I N I O N

The defendant was tried and convicted under the third count of the indictment. In essence that count charges that, with the intent to defraud a named credit union (from whom he borrowed money to buy a car), he obtained from the county court clerk a clear and unencumbered title to a $3150 Ford LTD automobile upon which the credit union had a lien, by falsely and fraudulently representing to the county court clerk that the credit union had released its lien and the car was unencumbered "with the fraudulent and felonious intent to deprive (the credit union) of its personal property and thereby caused (the county court clerk) to rely on said false and fraudulent representation and to deliver said unincumbered title to said automobile to the said defendant, . . ." (Emphasis supplied).

Thus, that count of the indictment does not charge that the defendant made any false representation to the credit union which owned the lien and was the victim, nor does it charge that the credit union relied upon any representation by the defendant. Instead, the indictment charges that the false and fraudulent representation was made to the county court clerk and that he relied on it and issued to the defendant an unencumbered title to the automobile. So, the question immediately arises whether the third count of the indictment charges a violation of TCA §39-1901, upon which this prosecution is based.

The trial judge read that statute to the jury, and stated the elements essential to constitute a violation of it exactly as they are set forth in Beck v. State, 203 Tenn. 671,

675, 315 S.W.2d 254 wherein the Court said: "Those elements are (1) the pretense, (2) the falsity of same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) the reliance of the victim upon the representations." (Emphasis supplied). In Beck, the prosecutor was bilked of $7,000 in money which he turned over to the defendants upon their false and fraudulent representation that they would arrange for him to purchase a large quantity of whiskey which the sheriff had confiscated and which the court had ordered sold. Thus, the fraudulent representation was made directly and personally to the owner of the money, he was the victim and turned his money over to them in reliance upon what they said.

In Mullican v. State, 210 Tenn. 505, 360 S.W.2d 35, it is emphasized that the person claiming to have been injured by the defendant's false and fraudulent representations must have parted with his property in reliance thereon, that by his false and fraudulent pretenses the defendant induced the party sought to be wronged to part with his property; and that the statute is not violated if the person claiming to have been defrauded parts with his property in reliance on the advice of others and not on the defendant's representations.

After stating the essential ingredients necessary to constitute a violation of TCA §39-1901, as above noted, the trial court went on to say to the jury:

> ". . . and the obtaining of the goods or money by false pretense and with an intent to defraud; and if the false pretense created the credit, it is within the statute.
>
> "You will note from the reading of Section 39-1901 of the Code above mentioned, that the law prohibits the obtaining of property by means of false pretense. Likewise, you will note the same law prohibits the obtaining of possession, intending at the time of receiving the property to feloniously steal the same. It is the State's theory that the

defendant had this intention and that he further demonstrated this intention at a subsequent date by obtaining a clear and unincumbered title to a 1972 Ford LTD automobile. Of course, it is for you, the Jury, to determine what the intention of the defendant was at the time of obtaining possession of the title to a 1972 Ford LTD automobile, and it is for you to determine, if in fact, the State has proved that this defendant did in fact, obtain the title to a 1972 Ford LTD automobil and if this fact sheds any light upon your determination of the issue of guilt in the initial obtaining possession of said property." (Emphasis supplied).

Upon this record there can be no doubt that the trial court was confused as to whether the defendant was charged with obtaining credit by false pretenses and as to whether the credit union's "property" mentioned in the indictment referred to the automobile. It is likewise clear that the jury also considered that the "property" involved was the automobile, for when they reported to the court after deliberation that they found the defendant guilty of receiving property by means of false pretenses and that they found the value of the property to be more than $100, there was a colloquy between the trial judge and the jury foreman in which the latter inquired if the jury had authority to fix the sentence at less than three years. The court replied that they could not do so if they found the value of the property over $100, and the foreman replied, "A '72 LTD is valued over a hundred dollars."

At any rate, it is unquestionable that the third count of the indictment upon which the defendant was convicted does not charge a violation of TCA §39-1901. He did not obtain the automobile from the credit union, and there is no charge or proof that he feloniously and fraudulently made any false pretense or representation to the credit union in obtaining the loan. Upon the face of this indictment and upon the record, his only false and fraudulent representation was made to the county court clerk, and that official believed and relied upon his false statement

that the credit union had released its lien on the car and issued to him a clear title to it.

Whatever crime the defendant committed, it was not obtaining property by false pretenses in violation of that statute. He was, therefore, convicted of a crime not charged in the indictment. Such a conviction cannot stand. Criminal prosecutions cannot be sustained by intendment, but everything necessary to constitute the offense must be charged. Church v. State, 206 Tenn. 336, 333 S.W.2d 799; Huffman v. State, 200 Tenn. 487, 495, 292 S.W.2d 738; Clark v. State, 197 Tenn. 67, 270 S.W.2d 361. See also: 21 Am.Jur.2d., Criminal Law §226, p. 265. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654.

Accordingly, the judgment of the trial court is reversed and this case is remanded thereto for further proceedings not inconsistent with this opinion.

W. Wayne Oliver
Judge

Concur:

Mark A. Walker
Presiding Judge

(SEE DISSENTING OPINION)
Charles H. O'Brien
Judge

Office of CLERK OF THE COURT OF CRIMINAL APPEALS
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, plete copy of the OPINION

Court, pronounced at its February term, 19 75, in case of

JESSIE D. McDONALD vs. STATE OF TENNESSEE

ers of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the

STATE of Tennessee, Petitioner,
v.
Jessie D. McDONALD, Respondent.

Supreme Court of Tennessee.

Jan. 19, 1976.

Rehearing Denied March 15, 1976.

Certiorari Denied April 26, 1976.

See 96 S.Ct. 1733.

Defendant was convicted in Criminal Court, Davidson County, Allen R. Cornelius, Jr., J., of false pretense. The Court of Criminal Appeals, reversed and certiorari was granted. The Supreme Court, Henry, J., held that the reliance of the victim is not an essential element of the offense "false pretense"; the offense is committed when the person to whom the false representation is made or the false token or counterfeit letter is offered relies upon the same to the ultimate detriment of the victim.

Judgment of trial court reinstated; that of Court of Criminal Appeals reversed.

1. False Pretenses ⇐10

Defendant, who obtained from county court clerk a clear and unencumbered title to automobile which was encumbered by a lien in favor of credit union by falsely and fraudulently representing that lien in favor of credit union had been released, was guilty of false pretense even if the victim did not rely upon the false representation. T.C.A. § 39-1901.

2. Criminal Law ⇐13.1(1)

Absolute precision in statute creating a criminal offense is not required; both common-law concept and constitutional process are satisfied when the statute informs all citizens as to what the State commands or forbids, and outlines the proscribed conduct with reasonable certainty.

3. Criminal Law ⇐13.1(1)

Terminology of criminal statute must give fair warning and must not be a trap for the innocent.

4. Criminal Law ⇐13.1(2)

False pretense statute outlines the proscribed conduct with reasonable certainty and gives fair warning. T.C.A. § 39-1901.

5. False Pretenses ⇐10

Reliance of the victim is not an essential element of the offense "false pretense" as defined in statute. T.C.A. § 39-1901.

6. False Pretenses ⇐10

False pretense statute is satisfied when the person to whom the false representation is made or the false token or counterfeit letter is offered relies upon the same to the ultimate detriment of the victim.

Milton P. Rice, Atty. Gen., William C. Koch, Jr., Asst. Atty. Gen., Nashville, for petitioner.

Jessie D. McDonald, pro se.

OPINION

HENRY, Justice.

We granted certiorari in this case to consider the single question of whether the reliance of the victim upon the false representation or pretense is necessary to sustain a conviction under Section 39-1901, T.C.A.[1]

We respond in the negative.

The words "false pretense" include all cases of pretended buying, borrowing, or hiring, bailment or deposit, and all cases of pretended ownership, where the person obtaining possession intended, at the time he received the property, feloniously to steal the same.

1. Section 39-1901 T.C.A. reads as follows:
39-1901. *False pretense.*—Any person, who, by any false pretense, or by any false token or counterfeit letter, with intent to defraud another, obtains from any person any personal property, or the signature of any person to any written instrument, the false making of which is forgery, shall, on conviction, be punished as in case of larceny.

I.

[1] Respondent was convicted upon an indictment which charged that he obtained from the county court clerk of Davidson County a clear and unencumbered title to a 1972 Ford LTD automobile which was encumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, by falsely and fraudulently representing that a lien in favor of the credit union upon the automobile had been released and that it was free of encumbrances.

Respondent's approach was incredibly ingenious and remarkably bold.

Under the name of Jessie D. McDonald, he applied for and received a loan from the credit union to finance the purchase of a new automobile. Upon closing he executed a note and security agreement. He then volunteered to take the documents downtown and apply for a certificate of title. This was the triggering false representation, and the credit union with astonishing credulity and naivete relied upon him.

The next day he presented himself at the County Court Clerk's Office, using the name of Jessie McDonald, II, and applied for a title certificate. In so doing he falsely and fraudulently gave his own address as the address of the credit union, with the result that the title was issued and mailed to the lien holder at respondent's address.

Subsequently, using the name of Jessie D. McDonald, II, he assigned the title to his father, Jessie D. McDonald, Sr. Two days thereafter, posing as Jessie D. McDonald, Sr. he presented himself at the County Court Clerk's Office and applied for a certificate of title. The certificate tendered to the clerk indicated that the vehicle had been sold to McDonald, Sr. and contained a notarized release of the lien, with the credit union's name stamped thereon. He made affidavit that the vehicle was free of encumbrances.

In order to avoid the sales tax, he executed an affidavit that the automobile was a gift from his son. In connection with the transfer of the license plates, he swore that Jessie D. McDonald and Jessie D. McDonald, Sr. were one and the same. This was true; all McDonalds were one and the same.

Subsequent to this he received a notice that payment was due and he wrote the credit union advising that his loan had been paid in full; that there was no lien on the automobile, and that he was no longer the owner.

This prosecution ensued.

II.

Our review has been limited to the narrow issue of whether the victim must rely upon the false representation to support a conviction under the statute.

Section 39-1901, T.C.A. originated in Chapter 23 of the Public Acts of 1829 and Chapter 48 of the Public Acts of 1841-1842.

To our knowledge the first case construing these enactments is *McCorkle v. State*, 41 Tenn. 333 (1860). The Court declared the ingredients of the offense to be "obtaining the goods by false pretences and with an intent to defraud." The Court made this significant comment:

> As was said by Lord Kenyon (3 Term Rep. 103), the statute creating this offense describes it in terms extremely general. It seems difficult to draw the line, and to say to what cases it shall extend; and therefore we must see whether each particular case, as it arises, comes within it. 41 Tenn. at 336, 337.

[2-4] This conclusion reached more than a century ago continues to be valid. Not even a statute creating a criminal offense can spell out the specifics with mathematical certainty and, indeed, absolute precision is not required. Both common law concept and constitutional due process are satisfied when the statute informs all citizens as to what the state commands or forbids, and outlines the proscribed conduct with reasonable certainty. Its terminology must give fair warning, *Raley v. Ohio*, 360 U.S. 423, 79

S.Ct. 1257, 3 L.Ed.2d 1344 (1959), and must not be a trap for the innocent. *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). Section 39–1901 meets these standards.

A significant recent case is *Beck v. State*, 203 Tenn. 671, 315 S.W.2d 254 (1958). There, the Court adopted the holding of *State v. Morgan*, 109 Tenn. 157, 69 S.W. 970 (1902) and reiterated that the elements of the offense of violating the statute on false pretenses are: "(1) the pretense, (2) the falsity of the same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) *the reliance of the victim* upon the representations." (Emphasis supplied). The state in brief correctly characterizes the fifth element (reliance) as dictum in view of the fact that the false representation was made by Beck directly to the victim, hence the Court was under no necessity to address this requirement. In *Morgan*, the Court, in passing upon the validity of the indictment, merely analyzed it under five headings, one of them being "reliance" of the victim. Again the Court did not directly address the necessity for reliance.

The latest pertinent pronouncement of this Court was in *Mullican v. State*, 210 Tenn. 505, 360 S.W.2d 35 (1962) wherein the Court enumerated the elements of the offense thusly:

> [T]he false representation made must be representation of a past or existing fact, whether it be by oral or written words or conduct, which is calculated to deceive, or intended to deceive, and does as a matter of fact deceive; and by means of which, by doing these things, the person who does it obtains something of value from the person injured without proper compensation. (citations omitted).
>
> . . . under this statute the intent to defraud is the gravamen or an essential element in the crime. 210 Tenn. at 511, 360 S.W.2d at 38.

Dicta aside, the courts of this state have never held that the reliance of the victim is an element of the offense proscribed in Section 39–1901. Indeed, there is an analogous line of cases to the contrary. As a matter of fact, *Beck, supra*, correctly treats as settled law that it is not necessary that the representation must be calculated to deceive a man of ordinary prudence and caution. As pointed out in 12 *Vanderbilt L.Rev.*, pages 1134, 1135 in commenting on this phase of *Beck*, "Regardless of its merits or demerits in tort law, it would seem strange indeed to let the necessity of such reliance remain in the law of crimes to work a kind of estoppel against victims of false pretenses who may be deficient in astuteness and vigilance in favor of the perpetrators thereof . . . ." Would it not be equally strange to establish as a part of our law that the reliance of the victim is an essential element of the offense of obtaining money or property under false pretenses?

It is obvious that there must be reliance by someone, but in this modern day and age when fraud and deceit are practiced with sophistication and ingenuity a narrow construction such as this would be tantamount to a judicial conference of the proverbial "license to steal."

[5, 6] We hold that the reliance of the victim is not an essential element of the offense "false pretense" as defined in Section 39–1901 T.C.A. We hold that our statute is satisfied, in this respect, when the person to whom the false representation is made or the false token or counterfeit letter is offered, relies upon the same to the ultimate detriment of the victim.

An excellent line of reasoning is contained in *Commonwealth v. Johnson*, 167 Ky. 727, 181 S.W. 368 (1916) [According to our own case of *State v. Higgins*, 148 Tenn. 609, 256 S.W. 875 (1923) the Kentucky statute is markedly similar to ours] The Court said:

> The statute does not require that the false statement should be made to any particular person, or that it should be with the intention of committing a fraud upon the person to whom the false statement was made. The offense is committed when the false statement is made, with the intention to commit a fraud, and money or property is thereby obtained.
>
> . . . . . .
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> The purpose of the statute is to punish the perpetrators of fraud committed through any false pretense. The gist of the offense is the successful misrepresentation, *regardless of the person to whom it was made*. (Emphasis supplied). 181 S.W. at 370.

The judgment of the trial court is reinstated; that of the Court of Criminal Appeals is

Reversed.

FONES, C. J., and COOPER, BROCK and HARBISON, JJ., concur.

OPINION ON PETITION TO REHEAR AND MOTIONS

HENRY, Justice.

The petition to rehear is respectfully overruled.

The motion to set aside the conviction is respectfully denied.

The motion for a stay pending application to the Supreme Court of the United States for certiorari is granted, providing the petition is timely filed. Pending the filing and disposition of said petition, the judgment of this Court will be stayed and defendant may remain upon his present bond.

Timothy A. CRAVEN, Plaintiff,
v.
Fred LAWSON, Defendant.
Supreme Court of Tennessee.
Jan. 26, 1976.

Action was brought against driver and owner of automobile for personal injuries sustained by a passenger in an accident. After settlement of the action against the driver, the Circuit Court, Knox County, Chester R. Mahood, J., rendered summary judgment for the owner and the Court of Appeals affirmed. On certiorari, the Supreme Court, Fones, C. J., held that the rule requiring that a motion for summary judgment be served at least 30 days prior to the hearing thereon was mandatory, not discretionary; that the trial judge erred in failing to grant passenger's motion to amend his complaint against the owner to allege negligent entrustment and other independent acts of negligence; and that the Uniform Contributions Among Tort Feasors Act did not change the rule that the derivative liability of a master or principal is extinguished by covenant not to sue the servant or agent.

Reversed and remanded.

1. Judgment ⇐183

Rule requiring that motion for summary judgment be served at least 30 days prior to hearing thereon was mandatory, not discretionary. Rules of Civil Procedure, rule 56.03.

2. Appeal and Error ⇐1177(2)

Where there is slightest possibility that party opposing motion for summary judgment has been denied opportunity to file affidavits, take discovery depositions or amend, by disposition of motion for summary judgment without 30-day interval following filing of motion, it will be necessary to remand case to cure such error. Rules of Civil Procedure, rule 56.03.

SUPREME COURT OF THE UNITED STATES

IN RE JESSIE McDONALD, PETITIONER

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 88–5890. Decided February 21, 1989

PER CURIAM.

Pro se petitioner Jessie McDonald requests that this Court issue a writ of habeas corpus pursuant to 28 U. S. C. § 2241(a). He also requests that he be permitted to proceed *in forma pauperis* under this Court's Rule 46. We deny petitioner leave to proceed *in forma pauperis*. He is allowed until March 14, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. We also direct the Clerk not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U. S. C. §§ 1651(a), 2241 and 2254(a), unless he pays the docketing fee required by Rule 45(a), and submits his petition in compliance with Rule 33. We explain below our reasons for taking this step.

Petitioner is no stranger to us. Since 1971, he has made 73 separate filings with the Court, not including this petition, which is his eighth so far this Term. These include four appeals,[1] 32 petitions for certiorari,[2] 22 petitions for extra-

[1] See *McDonald* v. *Alabama*, 479 U. S. 1061 (1987); *In re McDonald*, 466 U. S. 957 (1984); *McDonald* v. *Tennessee*, 432 U. S. 901 (1977); *McDonald* v. *Purity Dairies Employees Federal Credit Union*, 431 U. S. 961 (1977).

[2] See *McDonald* v. *Tobey*, 488 U. S. —— (1988) (No. 88–5619); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 481 U. S. 1053 (1987); *McDonald* v. *Tennessee*, 475 U. S. 1088 (1986); *McDonald* v. *Tennessee*, 474 U. S. 951 (1985); *McDonald* v. *Leech*, 467 U. S. 1208 (1984); *McDonald* v. *Humphries*, 461 U. S. 946 (1983); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 461 U. S. 934 (1983); *McDonald* v. *Draper*, 459 U. S. 1112 (1983); *McDonald* v. *Thompson*, 456 U. S. 981 (1982); *McDonald* v. *Metropolitan Government of Nash-*

ordinary writs,[3] five applications for stays and other injunctive relief,[4] and 10 petitions for rehearing.[5] Without recorded dissent, the Court has denied all of his appeals and

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ville & Davidson County, 455 U. S. 957 (1982); *McDonald* v. *Tennessee*, 454 U. S. 1088 (1981); *McDonald* v. *Draper*, 452 U. S. 965 (1981); *McDonald* v. *Tennessee*, 450 U. S. 983 (1981); *McDonald* v. *Draper*, 450 U. S. 983 (1981); *McDonald* v. *Metropolitan Airport Authority*, 450 U. S. 1002 (1981); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 450 U. S. 933 (1981); *McDonald* v. *United States District Court*, 444 U. S. 900 (1979); *McDonald* v. *Birch*, 444 U. S. 875 (1979); *McDonald* v. *United States District Court;* and *McDonald* v. *Yellow Freight Systems, Inc.*, 444 U. S. 875 (1979); *McDonald* v. *Thompson*, 436 U. S. 911 (1978); *McDonald* v. *Tennessee*, 434 U. S. 866 (1977); *McDonald* v. *Davidson County Election Commission*, 431 U. S. 958 (1977); *McDonald* v. *Tennessee*, 431 U. S. 933 (1977); *McDonald* v. *Tennessee*, 429 U. S. 1064 (1977); *McDonald* v. *Tennessee*, 425 U. S. 965 (1976); *McDonald* v. *Tennessee*, 423 U. S. 991 (1975); *McDonald* v. *Tennessee*, 416 U. S. 975 (1974); *McDonald* v. *Tennessee*, 415 U. S. 961 (1974); *McDonald* v. *Wellons*, 414 U. S. 1074 (1973); *McDonald* v. *Metro Traffic and Parking Comm'n*, 409 U. S. 1117 (1973); *McDonald* v. *Wellons*, 405 U. S. 928 (1972); *McDonald* v. *Metropolitan Traffic and Parking Comm'n*, 404 U. S. 843 (1971).

[3] *In re McDonald*, 488 U. S. —— (1988) (No. 88–5429, mandamus and/or prohibition); *In re McDonald*, 488 U. S. —— (1988) (No. 88–5428, mandamus and/or prohibition); *In re McDonald*, 488 U. S. —— (1988) (No. 88–5397, mandamus and/or prohibition); *In re McDonald*, 488 U. S. —— (1988) (No. 88–5006, common law certiorari); *In re McDonald*, 488 U. S. —— (1988) (No. 87–7220, common law certiorari); *In re McDonald*, 488 U. S. —— (1988) (No. 87–7183, common law certiorari); *In re McDonald*, 485 U. S. —— (No. 87–6420, mandamus); *In re McDonald*, 484 U. S. —— (1987) (No. 87–5008, common law certiorari); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7086, habeas corpus); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7052, common law certiorari and habeas corpus); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7086) (habeas corpus); *In re McDonald*, 479 U. S. 809 (1986) (habeas corpus); *In re McDonald*, 470 U. S. 1082 (1985) (habeas corpus); *In re McDonald*, 464 U. S. 811 (1983) (mandamus and/or prohibition); *McDonald* v. *Draper*, 451 U. S. 978 (1981); *McDonald* v. *Leathers*, 439 U. S. 815 (1978) (leave to file petition for writ of mandamus); *McDonald* v. *Thompson*, 434 U. S. 812 (1977) (leave to file petition for writ of habeas corpus); *McDonald* v. *Tennessee*, 430 U. S. 963 (1977) (motion to consolidate No. 76–6507 and for leave to file petition for

[Footnotes 4 and 5 are on page 3]

denied all of his various petitions and motions. We have never previously denied him leave to proceed *in forma pauperis*.[5]

The instant petition for a writ of habeas corpus arises from petitioner's 1974 state conviction for obtaining title to a 1972 Ford LTD automobile under false pretenses, for which he was sentenced to three years' imprisonment. Petitioner appealed to the Tennessee Court of Criminal Appeals, which reversed his conviction on the ground that there was no evidence that the alleged victim relied on petitioner's false statements. In January 1976, the Supreme Court of Tennessee reinstated his conviction. *State* v. *McDonald*, 534 S. W. 2d 650. We denied certiorari, 425 U. S. 955 (1976), rehearing denied, 425 U. S. 1000 (1976).

In the 13 years since his conviction became final, petitioner has filed numerous petitions and motions for relief in this

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writ of habeas corpus); *McDonald* v. *Thompson*, 429 U. S. 1088 (1977) (leave to file petition for writ of habeas corpus and other relief); *McDonald* v. *Tennessee*, 429 U. S. 1012 (1976) (stay and other relief); *McDonald* v. *United States Court of Appeals*, 420 U. S. 922 (1975) (leave to file petition for writ of mandamus); *McDonald* v. *Mott*, 410 U. S. 907 (1973) (leave to file petition for writ of mandamus and other relief).

[4]See *McDonald* v. *Metropolitan Government*, 487 U. S. —— (1988) (A-930, stay); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 481 U. S. 1010 (1987) (stay); *McDonald* v. *Alexander*, 458 U. S. 1124 (1982) (injunction); *McDonald* v. *Thompson*, 432 U. S. 903 (1977) (application for supersedeas bond); *McDonald* v. *Tennessee*, 415 U. S. 971 (1974) (stay).

[5]See *McDonald* v. *Alabama*, 480 U. S. 912 (1987); *In re McDonald*, 479 U. S. 966 (1986); *McDonald* v. *Tennessee*, 475 U. S. 1151 (1986); *In re McDonald*, 471 U. S. 1062 (1985); *McDonald* v. *Leeck*, 467 U. S. 1257 (1984); *McDonald* v. *Draper*, 459 U. S. 1229 (1983); *McDonald* v. *Thompson*, 457 U. S. 1126 (1982); *McDonald* v. *Draper*, 451 U. S. 933 (1981); *McDonald* v. *Tennessee*, 425 U. S. 1000 (1976); *McDonald* v. *Tennessee*, 417 U. S. 927 (1974).

[6]In the affidavit in support of his present motion to proceed *in forma pauperis*, petitioner states that he earns approximately $300 per month, is self-employed, and has less than $25 in his checking or savings account. He states that he has no dependents.

Court and in the Tennessee courts, all of which have been rejected. In the instant petition, for example, he requests that the Court "set aside" his conviction and direct the State to "expunge" the conviction "from all public records." He is not presently incarcerated. He contends that his constitutional rights were violated by the State's failure to prove that the property to which he obtained title under false pretenses was valued at over $100, as required by the statute under which he was convicted. Petitioner has put forward this same argument—unsuccessfully—in at least four prior filings with the Court, including a petition for mandamus, which was filed 13 days before the instant petition and was not disposed of by the Court until more than a month after this petition was filed.[1]

Title 28 U. S. C. § 1915 provides that "[a]ny court of the United States *may* authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor" (emphasis added). As permitted under this statute, we have adopted Rule 46.1, which provides that "[a] party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave to so proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 . . . setting forth with particularity facts showing that he comes within the statutory requirements." Each year, we permit the vast majority of persons who wish to proceed *in forma pauperis* to do so; last Term, we afforded the privilege of proceeding *in forma pauperis* to about 2,300 persons. Paupers have been an important—and valued—

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[1] See *In re McDonald*, 488 U. S. —— (1988) (No. 88–5428, petition for mandamus and/or prohibition); *In re McDonald*, 484 U. S. —— (1987) (No. 86–7052, petition for common law certiorari or habeas corpus); *McDonald* v. *Tennessee*, 475 U. S. 1088, rehearing denied, 475 U. S. 1151 (1986) (petition for certiorari); *In re McDonald*, 479 U. S. 809 (1986) (petition for habeas corpus).

part of the Court's docket, see, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and remain so.

But paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorneys fees—that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end. Although we have not done so previously, lower courts have issued orders intended to curb serious abuses by persons proceeding *in forma pauperis*.[4] Our order here prevents petitioner from proceeding *in forma pauperis* when seeking extraordinary writs from the Court.[5] It is perhaps worth noting that we have not granted the sort of extraordinary writ relentlessly sought by petitioner to any litigant—paid or *in forma pauperis*—for at least a decade. We have emphasized that extraordinary writs are, not surprisingly, "drastic and extraordinary remedies," to be "reserved for really extraordinary causes," in which "appeal is clearly an inadequate remedy." *Ex parte Fahey*, 332 U. S. 258, 259, 260 (1947).

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[4] See, *e. g.*, *Procup* v. *Strickland*, 792 F. 2d 1069 (CA11 1986); *Peck* v. *Hoff*, 660 F. 2d 371 (CA8 1981); *Green* v. *Carlson*, 649 F. 2d 285 (CA5 1981); cf. *In re Martin-Trigona*, 737 F. 2d 1254, 1261 (CA2 1984) ("Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions").

[5] Petitioner has repeatedly ignored the letter and spirit of this Court's Rule 26, which provides in part that, "[t]o justify the granting of [an extraordinary writ], it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

Petitioner remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 46 and does not similarly abuse that privilege.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

IN RE JESSIE McDONALD, PETITIONER

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 88–5890. Decided February 21, 1989

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

In the first such act in its almost 200-year history, the Court today bars its door to a litigant prospectively. Jessie McDonald may well have abused his right to file petitions in this Court without payment of the docketing fee; the Court's order documents that fact. I do not agree, however, that he poses such a threat to the orderly administration of justice that we should embark on the unprecedented and dangerous course the Court charts today.

The Court's denial not just of McDonald's present petition but also of his right to file for extraordinary writs *in forma pauperis* in the future is, first of all, of questionable legality. The federal courts are authorized by 28 U. S. C. § 1915 to permit filings *in forma pauperis*. The statute is written permissively, but it establishes a comprehensive scheme for the administration of *in forma pauperis* filings. Nothing in it suggests we have any authority to accept *in forma pauperis* pleadings from some litigants but not from others on the basis of how many times they have previously sought our review. Indeed, if anything, the statutory language forecloses the action the Court takes today. Section 1915(d) explains the circumstances in which an *in forma pauperis* pleading may be dismissed as follows: a court "may dismiss *the case* if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious" (emphasis added). This language suggests an individualized assessment of frivolousness or maliciousness that the Court's prospective order precludes. As one lower court has put it, a court's discretion to dismiss *in forma pauperis* cases summarily "is limited . . . in

every case by the language of the statute itself which restricts its application to complaints *found to be* frivolous or malicious." *Sills* v. *Bureau of Prisons*, 245 U. S. App. D. C. 389, 391, 761 F. 2d 792, 794 (1985) (emphasis added). Needless to say, the future petitions McDonald is barred from filing have not been "found to be" frivolous. Even a very strong and well-founded belief that McDonald's future filings will be frivolous cannot render a before-the-fact disposition compatible with the individualized determination § 1915 contemplates.

This Court's Rule 46 governs our practice in cases filed *in forma pauperis*. No more than § 1915 does it grant us authority to disqualify a litigant from future use of *in forma pauperis* status. Indeed, Rule 46.4 would seem to forbid such a practice, for it specifies that when the filing requirements described by Rule 46 are complied with, the Clerk "will file" the litigant's papers "and place the case on the docket." Today we order the Clerk to refuse to do just that. Of course we are free to amend our own rules should we see the need to do so, but until we do we are bound by them.

Even if the legality of our action in ordering the Clerk to refuse future petitions for extraordinary writs *in forma pauperis* from this litigant were beyond doubt, I would still oppose it as unwise, potentially dangerous, and a departure from the traditional principle that the door to this courthouse is open to all.

The Court's order purports to be motivated by this litigant's disproportionate consumption of the Court's time and resources. Yet if his filings are truly as repetitious as it appears, it hardly takes much time to identify them as such. I find it difficult to see how the amount of time and resources required to deal properly with McDonald's petitions could be so great as to justify the step we now take. Indeed, the time that has been consumed in the preparation of the present order barring the door to Mr. McDonald far exceeds that which would have been necessary to process his petitions for

the next several years at least. I continue to find puzzling the Court's fervor in ensuring that rights granted to the poor are not abused, even when so doing actually *increases* the drain on our limited resources. *Cf. Brown* v. *Herald Co.*, 464 U. S. 928 (1983) (BRENNAN, J., dissenting). Today's order makes sense as an efficiency measure only if it is merely the prelude to similar orders in regard to other litigants, or perhaps to a generalized rule limiting the number of petitions *in forma pauperis* an individual may file. Therein lies its danger.

The Court's order itself seems to indicate that further measures, at least in regard to this litigant, may be forthcoming in the future. It notes that McDonald remains free to file *in forma pauperis* for relief other than extraordinary writs, if he "does not similarly abuse that privilege." *Ante*, at 6. But if we have found his 22 petitions for extraordinary writs abusive, how long will it be until we conclude that his *32* petitions for certiorari are similarly abusive and bar that door to him as well? I am at a loss to say why, logically, the Court's order is limited to extraordinary writs, and I can only conclude that this order will serve as precedent for similar actions in the future, both as to this litigant and to others.

I doubt—although I am not certain—that any of the petitions Jessie McDonald is now prevented from filing would ultimately have been found meritorious. I am most concerned, however, that if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare, but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue. See, *e. g.*, *Chessman* v. *Teets*, 354 U. S. 156 (1957); *see id.*, at 173–177 (Douglas, J., dissenting).

This Court annually receives hundreds of petitions, most but not all of them filed *in forma pauperis*, which raise no colorable legal claim whatever, much less a question worthy

of the Court's review. Many come from individuals whose mental or emotional stability appears questionable. It does not take us long to identify these petitions as frivolous and to reject them. A certain expenditure of resources is required, but it is not great in relation to our work as a whole. To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer.

For the reasons stated in *Brown* v. *Herald Co.*, *supra*, I would deny the petition for a writ of habeas corpus without reaching the merits of the motion to proceed *in forma pauperis*. For the reasons stated above, I dissent from the Court's order directing the Clerk not to accept future petitions *in forma pauperis* for extraordinary writs from this petitioner.